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State v. May Respondent's Brief Dckt. 43704

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 43704
Plaintiff-Respondent,)	
)	Ada County Case No.
v.)	CR-2015-10897
)	
MISTY LARAE MAY,)	
)	RESPONDENT'S BRIEF
Defendant-Appellant.)	
_____)	

Issue

Has May failed to establish that the district court abused its discretion by imposing a unified sentence of 15 years, with three years fixed, upon her guilty plea to trafficking in heroin?

May Has Failed To Establish That The District Court Abused Its Sentencing Discretion

May pled guilty to trafficking in heroin (two grams or more, but less than seven grams) and the district court imposed a unified sentence of 15 years, with three years fixed. (R., pp.17-18, 40-43.) May filed a notice of appeal timely from the judgment of conviction. (R., pp.45-47.)

May asserts her sentence is excessive in light of her acceptance of responsibility, her abuse as a child, and her desire to be a mother to her children. (Appellant's brief, pp.2-4.) Because the three-year fixed portion of May's sentence is the mandatory minimum fixed term for trafficking in heroin (two grams or more, but less than seven grams), she may challenge only the indeterminate portion of her sentence. The record supports the indeterminate sentence imposed.

The length of a sentence is reviewed under an abuse of discretion standard considering the defendant's entire sentence. State v. Oliver, 144 Idaho 722, 726, 170 P.3d 387, 391 (2007) (citing State v. Strand, 137 Idaho 457, 460, 50 P.3d 472, 475 (2002); State v. Huffman, 144 Idaho 201, 159 P.3d 838 (2007)). It is presumed that the fixed portion of the sentence will be the defendant's probable term of confinement. Id. (citing State v. Trevino, 132 Idaho 888, 980 P.2d 552 (1999)). Where a sentence is within statutory limits, the appellant bears the burden of demonstrating that it is a clear abuse of discretion. State v. Baker, 136 Idaho 576, 577, 38 P.3d 614, 615 (2001) (citing State v. Lundquist, 134 Idaho 831, 11 P.3d 27 (2000)). To carry this burden the appellant must show that the sentence is excessive under any reasonable view of the facts. Baker, 136 Idaho at 577, 38 P.3d at 615. A sentence is reasonable, however, if it appears necessary to achieve the primary objective of protecting society or any of the related sentencing goals of deterrence, rehabilitation or retribution. Id.

The penalty for trafficking in heroin (two grams or more, but less than seven grams) is a mandatory minimum of three years fixed, up to life in prison. I.C. §§ 37-2732B(a)(6)(A), -2732B(a)(6)(D). The district court imposed a unified sentence of 15 years, with three years fixed, which falls well within the statutory guidelines. (R., pp.40-

43.) At sentencing, the state addressed the seriousness of the offense, the danger May presents to the community, and her failure to rehabilitate or be deterred. (Tr., p.25, L.15 – p.29, L.16.) The state submits that May has failed to establish an abuse of discretion, for reasons more fully set forth in the attached excerpt of the sentencing hearing transcript, which the state adopts as its argument on appeal. (Appendix A.)

Conclusion

The state respectfully requests this Court to affirm May's conviction and sentence.

DATED this 18th day of March, 2016.

/s/ Lori A. Fleming
LORI A. FLEMING
Deputy Attorney General

ALICIA HYMAS
Paralegal

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 18th day of March, 2016, served a true and correct copy of the attached RESPONDENT'S BRIEF by emailing an electronic copy to:

ANDREA W. REYNOLDS
DEPUTY STATE APPELLATE PUBLIC DEFENDER

at the following email address: briefs@sapd.state.id.us.

/s/ Lori A. Fleming
LORI A. FLEMING
Deputy Attorney General

APPENDIX A

<p style="text-align: right;">25</p> <p>1 I wanted to confirm that the parties</p> <p>2 have received and reviewed those materials.</p> <p>3 MR. NAUGLE: The State has, Your Honor.</p> <p>4 MR. BAILEY: Yes, Your Honor.</p> <p>5 THE COURT: Any corrections?</p> <p>6 MR. NAUGLE: No, Your Honor.</p> <p>7 MR. BAILEY: No, Your Honor.</p> <p>8 THE COURT: Mr. Naugle?</p> <p>9 MR. NAUGLE: Thank you.</p> <p>10 Your Honor, the State is seeking</p> <p>11 restitution in this case in the amount of -- I'm</p> <p>12 sorry, \$887.60. I'll send a copy of that order</p> <p>13 forward now. That is for the cost of</p> <p>14 investigation for the prosecution of this case.</p> <p>15 In this case, as the Court knows, the</p> <p>16 defendant was caught stealing from the Wal-Mart, a</p> <p>17 Wal-Mart here in town. A subsequent search of her</p> <p>18 vehicle revealed 5 grams of heroin and</p> <p>19 methamphetamine.</p> <p>20 This is not as obviously clear in the</p> <p>21 presentence investigation. But I thought I would</p> <p>22 make clear to the Court that she did admit to</p> <p>23 police, in full, to possessing that heroin,</p> <p>24 knowing it was hers, knowing she intended to sell</p> <p>25 it, as well as what she referred to as "salt,"</p>	<p style="text-align: right;">26</p> <p>1 that ultimately tested positive for</p> <p>2 methamphetamine. But she referred to that</p> <p>3 substance as "salt."</p> <p>4 She was able to explain to the</p> <p>5 detective who interviewed her exactly how those</p> <p>6 things were packaged, where they were in the car,</p> <p>7 and provide all of that information. There's no</p> <p>8 question she knew exactly where those drugs were</p> <p>9 and exactly what she was going to do with those</p> <p>10 drugs, which was to sell them.</p> <p>11 THE COURT: It's funny you say that. I had</p> <p>12 the exact same question in my mind when I read the</p> <p>13 presentence report and went back and looked at the</p> <p>14 police reports in length and saw, as you say, the</p> <p>15 police officer saw texts in her cellphone that</p> <p>16 were also consistent with drug sales.</p> <p>17 I've satisfied myself. And it was just</p> <p>18 interesting that you raised that, because I had</p> <p>19 the same concern. I didn't mean to interrupt you</p> <p>20 there.</p> <p>21 MR. NAUGLE: No worries. And I know that</p> <p>22 there is, any time you have a case that involves</p> <p>23 mandatory minimums, I know that many people in the</p> <p>24 legal community bristle at those mandatory</p> <p>25 minimums. But the State believes, and, you know,</p>
<p style="text-align: right;">27</p> <p>1 I personally would like to believe, that in cases</p> <p>2 where I don't believe that the mandatory minimum</p> <p>3 is appropriate, I'll reduce the case and get them</p> <p>4 out of that mandatory minimum if I don't think</p> <p>5 it's appropriate.</p> <p>6 I don't want to impress upon the Court</p> <p>7 the State's belief that the mandatory minimum is</p> <p>8 actually a minimum in this case. The State would</p> <p>9 be asking for more had she not taken</p> <p>10 responsibility for her crime in this case.</p> <p>11 And the reason for that is because we</p> <p>12 have a person before us, Misty May, who in 2009</p> <p>13 was convicted of possessing methamphetamine</p> <p>14 because her child was born with meth in her</p> <p>15 system. Following the birth of that child, she</p> <p>16 continued to be on methamphetamine until her</p> <p>17 arrest and went to prison for it.</p> <p>18 She spent a significant time in prison</p> <p>19 for those drug-related crimes. And yet despite</p> <p>20 spending time in prison, despite having a child</p> <p>21 who had methamphetamine in her system when she was</p> <p>22 born, she is out. And she is not dealing just</p> <p>23 meth this time. This time, she has doubled down,</p> <p>24 and she has decided to deal heroin in our</p> <p>25 community.</p>	<p style="text-align: right;">28</p> <p>1 And she's doing that despite the fact</p> <p>2 that she, herself, says she doesn't use heroin.</p> <p>3 But she's going to sell heroin to the poor people</p> <p>4 who might lose their lives because of this.</p> <p>5 The decision to deal drugs in this</p> <p>6 community, first of all, whether you have a drug</p> <p>7 history or not, I agree with there being</p> <p>8 significant prison sentences for people who deal</p> <p>9 heroin. It is so terribly dangerous and so</p> <p>10 destructive.</p> <p>11 And there's nobody who knew better the</p> <p>12 destruction that these drugs can cause than</p> <p>13 Ms. May. Her own past shows it. Her having a</p> <p>14 child with methamphetamine in its system, there is</p> <p>15 no more poignant way that anyone can know of the</p> <p>16 destruction that methamphetamine and heroin can</p> <p>17 have in the lives of people. And yet she chooses</p> <p>18 to continue dealing.</p> <p>19 And I understand that she's an addict</p> <p>20 herself. I understand she has had issues with use</p> <p>21 and addiction. I get all of that. But none of</p> <p>22 that excuses the dealing of these kinds of drugs</p> <p>23 in the community. It simply doesn't.</p> <p>24 This is not a victimless crime. And</p> <p>25 this is not a crime that should be excused by her</p>

<p style="text-align: right;">29</p> <p>1 own addiction issues. At the very least, this 2 crime aids in the loss and destruction of people's 3 lives. If she wants to be -- to continue to be a 4 part of that process, in the State's view, she 5 better be ready to go to prison. 6 Again, if the defendant were to take 7 this to trial, if she weren't to take 8 responsibility for what she has done, the State 9 would be recommending a stiffer prison sentence. 10 It is because of her willingness to admit what she 11 did, to take responsibility, that the State is 12 recommending the mandatory minimum. 13 And, therefore, we ask that you follow 14 the State's plea agreement, that you impose a 15 three-year fixed, with a 12-year indeterminate 16 prison sentence, for 15 years. 17 I believe there's a minimum fine of 18 \$10,000. We would ask that you impose that. We 19 would ask for the restitution in the amount of 20 \$887.60. 21 And there are no special terms the 22 State is seeking in this case. 23 Thank you. 24 THE COURT: Thank you, Mr. Naugle. 25 Mr. Bailey?</p>	<p style="text-align: right;">30</p> <p>1 MR. BAILEY: Thank you, Your Honor. 2 And I certainly do appreciate 3 Mr. Naugle's statements to the Court with regard 4 to Ms. May taking responsibility for her crime. 5 Your Honor, one of the things that has 6 been remarkable for me in talking with Ms. May is 7 really her positive attitude about this, I mean, 8 facing this kind of prison time. You know she's 9 pregnant and due in January. You would think that 10 the circumstances would just simply be 11 overwhelming. 12 But she has been -- I don't want to say 13 like a ray of sunshine, but she has certainly had 14 a positive attitude every time I have met with 15 her. And I think, in large part, she attributes 16 that to this being some divine intervention. 17 When she was out on parole, she was 18 doing very well. And I think in her words, she 19 was saying, well, I got a little cocky. I thought 20 I could maybe dip my toe back into the water of 21 use. And all of a sudden, she's in way over her 22 head and out of control. 23 And she knows it. And so I think she 24 realizes that the path she was on was going down 25 the stony end, and she needed to get off that</p>
<p style="text-align: right;">31</p> <p>1 path. And I think, in some ways, it is a relief 2 for her to be off that path and, frankly, out of 3 that lifestyle, regardless of the fact that she 4 knows she's going to the penitentiary. 5 A couple of things, Your Honor, on that 6 parole violation, she tells me she has nine months 7 hanging over her head. We would ask this court to 8 make her sentence in this case concurrent with 9 that. 10 The PSI just reveals an absolutely 11 nightmarish early childhood, that she has with 12 reports of being molested for about three years 13 from the time she was four years old. You know, 14 very difficult and trying circumstances in her 15 early childhood, no question about it. I think 16 that is somewhat reflected in her criminal 17 history. 18 But, you know, she tells me that, 19 basically, she and her sister raised themselves. 20 And you got that letter from her sister, who is 21 also incarcerated at the moment on a DUI. I know 22 she's very close with her sister. 23 Her pregnancy, as I mentioned to the 24 Court, she is due in January. She, I think, is 25 ready to take steps after this pregnancy not to be</p>	<p style="text-align: right;">32</p> <p>1 in that circumstance again. So I think she's 2 going to follow through on that. 3 With regard to a sentence here, 4 Your Honor, the mandatory minimum and the 5 mandatory minimum fine, I would simply ask the 6 Court to take that into account with regards to 7 any public defender reimbursement. 8 With regard to the restitution, I can 9 tell you this, Ms. May is fine with it. But, 10 again, you know, she has got a \$10,000 fine 11 coming. If the Court could see fit to give her 12 some relief, in particular with regard to the 13 reimbursement of the prosecutor's office for 14 prosecuting the crime, I think that's about \$275. 15 Again, I'm just thinking that, 16 eventually, she will be out of custody, hopefully. 17 And that \$10,000 is going to be waiting for her, 18 and that's an awfully tough start. So any relief 19 she can get on that would be appreciated, I know. 20 THE COURT: Let me stop you there, because 21 you're asking about restitution. At the time she 22 pled guilty, she heard in court that the 23 restitution amount was somewhere between three and 24 \$400. And now it's more than double that. 25 I'm wondering if you know, and maybe</p>